(2) the learned trial judge erred in law in not holding that having regard to the simple background of the appellant ignorance of procedural law could constitute special grounds for allowing the application.

The issue of construction of O.39 R.2(6) was not raised.

I have been informed by the Registrar that no written grounds of judgment was issued by the Federal Court in that appeal, so that one is unable to say whether their Lordships considered the abovementioned question of construction at all.

I have given what I have held in the case of *Law Yee Wah & Anor.* v. *Poh Koh & Sons Realty Sdn. Bhd.*[9] much thought, and I can find no reason to justify any modification to the conclusions I have expressed therein.

There is much to say for the argument raised in support of the application i.e. that this rule had the object of allowing an appellant, after receiving the grounds of decision, to decide whether he is going to proceed with the appeal. [See O.39 R.2(5)].

Though service of the notice of appeal on the respondents was effected some 45 days after the last date for its filing in court, the notes of evidence and grounds of judgment were supplied to appellant only about a week before that. In the circumstances I would hold that service had been effected on respondents with all convenient speed, and that no question of extension of time for doing so arises.

I would, with respect allow the appeal with costs.

Appeal dismissed.

Solicitors: *Lim, Lim & Oon; Jayadeva & Zahir.*

RE WAN KEE CHEONG, DECD.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) April 26, 1975]

[Ipoh — Federal Court Civil Appeal No. 102 of 1974]

Wills Ordinance, 1959, ss. 12 and 16 — Revocation of Will by subsequent marriage — Revival of Will — Whether material that testator know that the Will had been revoked.

This was an appeal from the decision of Wan Hamzah J. ([1975] 1 M.L.J. 150). The testator had made his Will on August 8, 1952 in which he appointed his wife, Cheong Saw Yong as the sole executrix and trustee of his Will. Subsequently his wife died and the testator married the 4th respondent. After the said marriage the testator made codicils to the Will and after making alterations to the legacies he said "In all other respects I confirm my said Will". The question which arose was whether the Will and the two codicils could be admitted to probate. Wan Hamzah J. held that it was clear that the testator intended that his Will would be operative and it was immaterial whether he knew that the Will had been revoked by his marriage. He therefore decreed probate in respect of the Will and the two codicils. On appeal,

Held, dismissing the appeal: the effect of the execution by the testator of the first codicil in 1964 was to revive his Will of 1952 which had been revoked by his marriage in 1964 and the learned judge was therefore quite right in admitting the Will and codicils to probate.

Cases referred to:-

(1) *In the goods of Steele* (1865-9) 1 P. & D. 575.

(2) *Re Taylor* [1938] 1 All E.R. 586.

(3) *McLeod* v. *McNab* [1891] A.C. 471.

(4) *In re Pearson* [1963] 1 W.L.R. 1358.

(5) *In the estate of Marden* [1944] P. 101.

(6) *In the goods of Davies* [1952] P. 279.

FEDERAL COURT.

N. T. Rajah (*Bachan Singh* with him) for the first and second appellant.

Phillip Leong for the first and second respondents.

W. S. W. Davidson for the third and fourth respondents.

M. Sivalingam for the first intervener.

G. Moganasundaram for the second intervener.

Gill C.J. (Malaya): This is an appeal from an order of Wan Hamzah J. admitting to probate the will and two codicils to the said will made by Wan Kee Cheong deceased of Ipoh.

The testator made his will on August 8, 1952, appointing his wife Cheong Sau Yoong as the sole executrix and trustee of his will. Under his will, after making certain pecuniary legacies to his wife Cheong Sau Yoong, to each of his daughters Wan Sek Choon, Wan Wai Choon, Wan Thye Choon, Wan Chiew Choon, Wan Poh Choon, Wan Choi Koon and Wan Chooi Weng and to each of his sons Wan Kah Chan alias Wan Kar Chan and Wan Kah Keong alias Wan Kar Keong, he left the residuary estate to his wife Cheong Sau Yoong (4 shares), to his son Wan Kah Chan alias Wan Kar Chan (3 shares) and to his son Wan Kah Keong alias Wan Kar Keong (3 shares).

The testator's wife Cheong Sau Yoong died on May 11, 1963. On September 4, 1964 the testator married one Loke Yen Thye. On October 15, 1964 he made his first codicil to his will. Under it, after reciting that his wife Cheong Sau Yoong named in his will as the sole executrix and trustee had died, he appointed his eldest daughter Wan Sek Choon, his sixth daughter Wan Choi Koon and his eldest son Wan Kah Chan alias Wan Kar Chan to be the executors and trustees of his will in place of the said Cheong Sau Yoong deceased. In all other respects he confirmed his will and directed his executors and trustees to pay Loke Yen Thye, his second lawful wife, a legacy in the sum of $5,000 in cash immediately upon his death and a sum of $150 monthly commencing two weeks after his demise for her monthly maintenance and household expenses until the distribution of his estate, unless she led an unchaste life or remarried and chose to leave his house.

On March 28, 1972 the testator made a second codicil to his will, under which he directed his trustees to hold his immovable and real property known as and situate at No. 85 Jalan Ampang, Kampar and held under Certificate of Title No. 2691 for Lot No. 850 in the town of Kampar, together with all income therefrom, in trust for his wife Loke Yen Thye. The testator died on April 1, 1972.

The order appealed from was made in a probate action which was commenced by Wan Chooi Kin alias

Wan Choi Koon (f) and Dr. Wan Kar Chan, two of the executors and trustees appointed under the first codicil to the will. Wan Sek Heng alias Wan Wai Choon (f), Wan Sek Choon (f) and Loke Yen Thye (f) were the first, second and third defendants in the action.

Wan Kah Keong, Wan Choi Weng (f), Wan Chiew Choon (f) and Wah Poh Choon (f) came in as the first, second, third and fourth interveners respectively in the action. The only other beneficiary under the will, Wan Thye Choon (f), was neither a party to nor an intervener in the action. The appeal was brought by the first defendant and the fourth intervener in the action with the two plaintiffs and the second and third defendants as the four respondents to the appeal, and the first, second and third interveners in the action as the first, second and third interveners in the appeal.

The question which the learned trial judge had to determine was whether the will made by the testator, which was revoked upon his marriage with Loke Yen Thye by virtue of the provisions of section 12 of the Wills Ordinance 1959, was subsequently revived by either of the two codicils made by him to his will.

It was contended on behalf of the first and third defendants that for the will to be revived under section 16 of the Wills Ordinance 1959, after it had been revoked under section 12 by reason of the testator's marriage, there had to be evidence of an intention on the part of the testator to revive it and that there could not be an intention to revive unless there was evidence to show that he knew that the will had been revoked by his marriage.

It was next contended that it was not sufficient that there was an intention that the will should be operative without there being an intention to revive it. In this connection it was pointed out that no extrinsic evidence had been adduced by the plaintiffs of the surrounding circumstances from which intention to revive could be inferred. It was next pointed out that most of the cases cited in support of revival were cases in which the testator had made two or more wills, the later revoking the earlier, so that there was no question of the testator not knowing that the earlier will had been revoked when he confirmed it. It was further pointed out that in the books of Forms and Precedents the word "confirm" is used only in the forms of codicils for altering, amending or varying a will, but that in the forms of codicils for reviving a revoked will other appropriate words are used. It was lastly pointed out that in the present case the solicitors who had drawn up the two codicils had not used the appropriate form for reviving a will, thus showing that there was no intention on the part of the testator to revive his will.

The learned judge rejected all those contentions, as he formed the opinion that the words "intention to revive the same" in section 16(1) of the Wills Ordinance mean and include intention that the will should have effect. He therefore went on to hold that there could be no doubt that the intention of the deceased after his marriage with the third defendant was that his will should have effect subject to certain modifications, because in his first codicil he referred to his will by date, directed that his will shall be construed and have effect subject to those modifications as mentioned in the codicil, and in all other respects confirmed his will.

The learned judge's reasons for answering the question before him in the affirmative, and thus decreeing probate in respect of the will and the two codicils of the testator, are stated in his judgment as follows:—

> "In my opinion where a testator although ignorant of his Will having been revoked by his subsequent marriage, in a properly executed codicil confirms that Will, thereby showing that he intends that the Will shall have effect, this is sufficient to revive the Will under section 16. In my opinion in the present case it is not material whether the deceased knew his Will had been revoked. From the two codicils I find the deceased intended that his Will should be operative, and therefore I hold that the Will has been revived. To hold that the Will has not been revived would be to frustrate the clear intention of the deceased that his Will should be carried out.
>
> As regards the question of fact in this case whether the deceased knew that his Will had been revoked by his subsequent marriage, I am inclined to infer from the facts in this case that the deceased had been so advised by the two solicitors who helped him to execute the respective codicils.
>
> I find that the gifts in the two codicils are not inconsistent with one another and they can stand together. Although the codicil of 28 March 1972 is described therein as a first codicil, apparently this is a mere misdescription and there is nothing else to show intention that the codicil of 15 October 1964 should not have effect."

The learned judge's judgment is criticised on several grounds as set out in the memorandum of appeal, but they all boil down to the one main ground that the learned judge was wrong in holding that where a testator although ignorant that his will had been revoked by subsequent marriage executes a codicil to that will confirming the same, that codicil was sufficient to revive the will.

Now, the law as to revival of a revoked will is contained in section 16(1) of the Wills Ordinance 1959 which reads as follows:—

> "16(1) No Will or any part thereof which has been revoked in any manner shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required; and showing an intention to revive the same."

Section 16 is in *pari materia* with section 22 of the English Wills Act 1837. Before the passing of that Act the law in England was that reference in a codicil to a will which had been revoked by marriage was sufficient to revive that will. In other words, a will could be revived by implication. Section 22 of the Wills Act, it has been said, was enacted to do away with revival by implication. The authority generally cited for that proposition is the case of *In the Goods of Steele.*[1] The headnote to that case reads as follows:—

> "A codicil may, be referring in adequate terms to a revoked Will, revive that will if it be in existence, but the codicil must 'show an intention to revive the same' (1 Vict. c 26, s. 22). In order to satisfy those words the intention must appear on the face of the codicil, either by express words referring to a Will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the court with reasonable certainty the existence of the intention. Since the passing of the statute a Will cannot be revived by mere implication."

It was contended before us that the codicils in the present case were in the forms used for codicils for varying and adding to a will. In this connection, reference was made to the *Encyclopedia of Forms and*

Precedents (4th Edn.) Vol. 23, Forms 12: 1 to 12: 16 at pages 781 to 794, in which the operative words are "in all other respects I confirm my said will". Reference was then made to form 12:17 at pages 794 and 795, being the form of a codicil on the occasion of the testator's second marriage, in which the operative words used are "in all other respects I confirm and revive my said will." Reference was similarly made to *Williams* on Wills (3rd Edn.) Forms 1-6 at pages 919 to 924 respectively to show that, whereas in the case of a codicil varying or adding to a will the word "confirm" is sufficient, in the case of a codicil on the occasion of the testator's second marriage the words "confirm and revive" must be used. In the case of the codicils in the present case, it was argued that the intention to revive should have been stated in the first codicil. It was contended that three things are missing from the first codicil. First, there is no mention of the fact of revocation by reason of the second marriage. Secondly, there is no mention of any intention to revive. Thirdly, there are no express words used to revive.

It was next contended that there was no evidence to support the learned judge's inference that the solicitors who helped the testator to execute the two codicils had advised him as to the revocation of his will by his subsequent remarriage, as no extrinsic evidence had been produced to show the testator's intention. In this connection reference was made to the case of *Re Taylor*.[2] In short, it was contended that as no evidence had been produced that the testator was aware of the fact that his will had been revoked by operation of law, there is a lacuna or gap in the case which cannot be bridged.

Counsel for the first intervener relied on the decision of the Privy Council in *McLeod* v. *McNab*[3] which, he contended, was a complete answer to all the submissions made on behalf of the appellants. In that case the court was concerned with the construction of a provision of law which was in *pari materia* with section 16 of our Wills Ordinance. Delivering the judgment of their Lordships of the Privy Council in that case, Lord Hannen said at pages 475, 476:

"An argument has been addressed to their Lordships that the mere statement that the testator confirms the Will of 1880 is not sufficient, without any express statement that the testator revokes the revocation of the residuary bequest. Their Lordships are of opinion that if the meaning be, as they consider it is, that he confirms the Will of the 17th of July, 1880, on its terms, that is in itself a restoration of the residuary bequest contained in it; and their Lordships are also of opinion that the word 'confirm' is an apt word, and expresses the meaning, and has the operation of the word 'revive', which is used in the statute."

In my judgment the contention of learned counsel for the first intervener must prevail. I do not think there is anything very sacrosanct about the forms used in the *Encyclopedia of Forms and Precedents* and *Williams* on Wills to which reference has been made earlier. It would of course make assurance doubly sure to use the word "revive", but I can see no reason why the word "confirm" in the context of this case should not be construed to mean "revive". It seems to me as a matter of construction that the effect of the words in the first codicil of the testator confirming his only will, to which there is a clear reference in the codicil, is to incorporate into the codicil all the provisions of that will except in so far as they are displaced by that codicil. (See in *re Pearson*[4]).

In the case of *In the Estate of Marden*,[5] Barnard J. said at pages 110 and 111:

"It is clear from the authorities that it is not necessary that a codicil should show on the face of it that the deceased knew that the Will to which the codicil purports to be a codicil had been revoked, and that she was, in fact, reviving that Will. This codicil shows an intention to revive a part of the revoked Will because it refers to certain porvisions of that Will as of an existing and a valid Will. I am fortified by the view I take of the law by what Sir James Hannen P. said in his judgment in *In the Goods of Dyke* ((1881) 6 P.D. 205, 208):

'Where a simple mistake has been made as to the date of an instrument, the mistake can be set right: but in a case like this where the mind of the draftsman, whether the testator himself, or someone employed by him, has been really applied to the words of a particular instrument, it is impossible for me to say that it was by mistake that that instrument was referred to instead of another. It is plain that that was the actual instrument which the then draftsman had in his mind, and it is not possible to avoid the conclusion that the codicil which purports to be a codicil to the will of October 29, 1878 [that was the first and the revoked Will] 'and which, after making certain alterations, confirms that will in all respects does revive that Will."

In the present case, the first codicil purported to be a codicil to the only will of the testator. That codicil, after making certain alterations, confirmed the will in all other respects. In the circumstances, it is not possible to avoid the conclusion that it did revive that will.

In the case of *In the Goods of Davies*,[6] Willmer J. said at pages 281 and 282:

"I was very much impressed with the argument of counsel for the applicant when he pointed out that one must assume that the testator intended to execute some sort of effective document when he executed the document of 1943; he cannot be credited with an intention to execute a wholly ineffective codicil to a wholly ineffective Will.... If I am not to infer that in preparing this document, and having it executed in the form of a codicil, that testator intended to revive his Will, what other intention can possibly be imputed to him? Nobody suggests that he was otherwise than in full possession of his faculties. It seems difficult to draw the inference that in executing this document he was intending to revoke the Will. For the Will was in any case already revoked by his marriage; and even if he were unaware of that (although, as I have pointed out, there is evidence to show that he had been reminded of it), there are easier ways than that to revoke a Will which you wish to revoke.

I am baffled when I try to think what other intention the deceased could possibly have had except to revive the Will. It appears to me that the words ought to be construed, if they legitimately and fairly can be construed, so as to have some effect. The only effect I can give them is the effect of making the Will effective."

I would echo those words of the learned judge, as they apply so aptly to the facts of the present case, and hold that the effect of the execution by the testator of his first codicil in 1964 was to revive his will of 1952 which had been revoked by his marriage in 1964.

In the final analysis, the answer to the question posed by this appeal is farily simple, and it is this. If a codicil refers by date to an existing will and expressly confirms it, that sufficiently shows an intention to revive it, the word "confirm" being an apt word and expressing the meaning and having the operation of the word "revive" which is used in section 16 of the Wills Ordinance 1959. (See *Halsbury's* Laws of England 3rd Edition, Volume 29, page 902 paragraph 1371). Thus the learned judge in the court below was quite right in admitting the will and the codicils to probate. I would therefore dismiss the appeal.

As regards costs, the learned judge made an order for a separate set of costs out of the estate for each of the parties. In my opinion that order needs to be varied to some extent because several different orders become necessary where there are a number of parties to whom different considerations apply. There can be no doubt that the plaintiffs are entitled to their solicitor and client costs out of the estate both in the court below and here. The interest of the third defendant being divergent from the interests of the other parties, she was entitled to separate representation and is therefore entitled to costs out of the estate in the court below and here. The first intervener was the principal party arguing in favour of the validity of the three documents and having succeeded, he is similarly entitled to costs out of the estate. The second intervener is also entitled to costs out of the estate as she supported the first intervener and their interests are divergent. As the first defendant and the third and fourth interveners had reasonable grounds for opposing the will, they must get their costs out of the estate, but as there was no divergence in their interests there should be an order for only one set of costs for them in the court below and here. The second defendant, being the third executrix named in the will, took no part in the proceedings and did not ask for costs. So no order should have been made in respect of her costs. I would therefore vary the learned judge's order of costs accordingly.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Cheang Lee & Ong; Lewis & Co.; Lim Kean Chye & Co.; Yeoh Kian Teik & Co.*

GOVERNMENT OF MALAYSIA v. MAHAN SINGH

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ong Hock Sim F.J.) May 3, 1975]
[Kuala Lumpur — Federal Court Civil Appeal No. 63 of 1974]

Administrative Law — Termination of service of member of public service — Permanent officer — Officer holding office at pleasure of Yang Dipertuan Agung — Whether officer has right to be heard — Emergency Regulation — Delegation of powers of Yang Dipertuan Agung — Public Officers Regulation (Conduct and Discipline) (General Orders Cap. D) 1969 — Pensions Ordinance, 1951, s. 5 — Federal Constitution, arts. 132(2A), 135(2).

Constitutional Law — Termination of service — Federal Constitution, arts. 132 & 135.

The respondent was an officer on the permanent establishment. As a result of a report made by the officer's head of department, his services were terminated by the Director of Operations under regulation 44 of the General Orders Cap. D. The respondent brought an action against the Government for a declaration that the termination of his service was void. In the High Court the learned judge gave judgment in favour of the respondent. The appellants appealed. The main issue on the appeal was whether the purported termination of the respondent's service by the Government was lawful.

Held, allowing the appeal: (1) a pensionable officer has no right, lien, or title to his post and all Federal public officers hold office at the pleasure of the Yang Dipertuan Agung;

(2) Regulation 44 of General Orders (Cap. D) is not inconsistent with the Federal Constitution and is therefore valid;

(3) the Government had power to terminate the respondent's service in the public interest under the regulation and as Government's decision to do so did not involve punishing or penalising the respondent, he had not been dismissed and therefore was not entitled to a reasonable opportunity of being heard under Article 135(2) of the Federal Constitution.

Cases referred to:-

(1) *Haji Ariffin* v. *Government of State of Pahang* [1969] 1 M.L.J. 6.
(2) *Gnana Sundram* v. *Public Services Commission* [1966] 1 M.L.J. 157.
(3) *Government of Malaysia* v. *Lionel* [1974] 1 M.L.J. 3.
(4) *S.K. Pillai* v. *State of Kedah* 6 F.M.S.L.R. 160, 170.
(5) *Amalgamated Union of Public Employees* v. *Permanent Secretary (Health)* [1965] 2 M.L.J. 210.
(6) *Moti Ram* v. *N.E. Frontier Railway* A.I.R. 1964 S.C. 600.
(7) *Munusamy* v. *Public Services Commission* [1967] 1 M.L.J. 199.
(8) *State of U.P.* v. *Shyam Lal* A.I.R. 1971 S.C. 2151.
(9) *Eng Keock Cheng* v. *Public Prosecutor* [1966] 1 M.L.J. 18, 20.
(10) *Munusamy* v. *Public Services Commission* [1964] M.L.J. 239, 243.
(11) *Dhingra* v. *Union of India* [1958] S.C.R. 828; A.I.R. 1958 S.C. 36.
(12) *Local Government Board* v. *Arlidge* [1915] A.C. 120.
(13) *Ridge* v. *Baldwin* [1964] A.C. 40.
(14) *Maxwell* v. *Department of Trade and Industry* [1974] Q.B. 523.
(15) *Stephen Kalong Ningkan* v. *Government of Malaysia* [1968] 2 M.L.J. 238.
(16) *Ronnfeldt* v. *Phillips & Ors.* (1918) 35 T.L.R. 47.
(17) *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* [1920] A.C. 508.
(18) *Salpetre's Case* (1602) 12 Co. Rep. 12.
(19) *Shiponmey's Case, R.* v. *Hampden* 3 St. Tr. 825.
(20) *Re an Arbitration between Shipton Anderson & Co. and Harrison Brothers & Co.* [1915] 3 K.B. 676.
(21) *Thambipillai* v. *Government of Malaysia* [1967] 2 M.L.J. 206, 208.
(22) *Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482, 495, 500.

FEDERAL COURT.

Abu Talib bin Othman (Senior Federal Counsel) (*Lim Beng Choon*, Federal Counsel with him) for the appellant.

M. Sivalingam for the respondent.

Suffian L.P. (read by **Ong Hock Sim F.J.**): The plaintiff joined Government service on February 15, 1947, as a Clerk and Punjabi Interpreter. On October 1, 1949, he was put on the permanent establishment. He served as Registrar of the Sessions Court from April 1, 1961, to November 30, 1969. On December 1, 1969, he was transferred to the office of the Special Commissioners of Income Tax at Kuala Lumpur.

While he was working with the Special Commissioners of Income Tax, a report dated January 3, 1970, on his conduct and work was received by the Director of Public Services Department from the Secretary to the Ministry of Justice under regulation 44 of the Public Officers (Conduct and Discipline) (General Orders, Cap. D) Regulations, 1969, published on July 29, 1969, as P.U. (A) 273, hereinafter referred to as Cap D. That report is privileged under section 123 of the Evidence Act and no copy was ever supplied to the plaintiff. The Secretary to the Ministry of Justice was the head of the department in which the plaintiff had